

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 18, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CLAUD R. KOERBER,

Defendant - Appellant.

No. 17-4121
(D.C. No. 2:17-CR-00037-RJS-PMW-1)
(D. Utah)

ORDER

Before **LUCERO, HOLMES, and McHUGH**, Circuit Judges.

Defendant Claud R. Koerber appeals the district court's July 21, 2017 order addressing several of his pretrial motions. The order being appealed is 43 pages and substantively addressed five pretrial motions. In a footnote on page 8, the district court denied the defendant's request to enjoin the government from future prosecution based on the same allegations made in the underlying case, which was embedded in his motion to dismiss the indictment on statute of limitations grounds and premised on the same legal analysis as that motion to dismiss. It is from the denial of injunctive relief that the defendant filed his interlocutory appeal.

The government filed a motion to dismiss the defendant's appeal for lack of jurisdiction. 10th Cir. R. 27.3(A). The government argued that the defendant's request for injunctive relief and the district court's proportionate treatment of that request was so

minor that the denial does not fall within the statutory exception to the final judgment rule for orders addressing injunctive relief. *See* 28 U.S.C. § 1292(a)(1). The substantive request for relief was dismissal of the indictment on timeliness grounds, which the government claimed is not immediately appealable. *See Flanagan v. United States*, 465 U.S. 259, 269-70 (1984); *see also United States v. Angilau*, 717 F.3d 781, 783-86 (10th Cir. 2013). Also, the government asserted that the district court's order did not expressly deny or have the practical effect of denying a true motion for injunctive relief, since it only addressed a procedural matter and one that can be adequately reviewed after entry of final judgment. The defendant responded to the government's motion by recasting his district court motion in a different light, arguing that his request for injunctive relief was central to his motion to dismiss the indictment. He stressed that he explicitly requested, and the district court expressly denied, injunctive relief. The defendant also implied that jurisdiction exists under other theories.

The defendant has not persuaded us we have jurisdiction to consider his interlocutory appeal. Accordingly, the government's motion to dismiss is granted. In light of this dismissal, we deny the defendant's *Motion to Stay Lower Court Proceedings Pending Appeal* as moot.

Judge Holmes dissents from the dismissal of this appeal.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk



by: Lara Smith
Counsel to the Clerk

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK**

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

August 18, 2017

Chris Wolpert
Chief Deputy Clerk

Mr. Marcus R. Mumford
Mumford PC
405 South Main Street, Suite 975
Salt Lake City, UT 84111

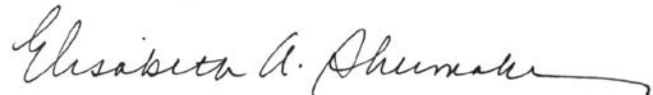
RE: 17-4121, United States v. Koerber
Dist/Ag docket: 2:17-CR-00037-RJS-PMW-1

Dear Counsel:

Enclosed please find a final order issued today by the court.

Please contact this office if you have questions.

Sincerely,



Elisabeth A. Shumaker
Clerk of the Court

cc: Aaron B. Clark
Ruth Hackford-Peer
Tyler Murray
Jeannette Frazier Swent
Ryan Davis Tenney
Stewart C. Walz

EAS/kf